

DAVID M. COOK
Claimant

VS.

COHEN ESREY REAL ESTATE
Respondent

AND

ZENITH INSURANCE COMPANY
Insurance Carrier

The parties stipulated claimant suffers a 20 percent scheduled injury to his right shoulder. The disputed issue was whether he had a compensable accidental injury arising

out of and in the course of his employment on October 19, 2001. The Administrative Law Judge (ALJ) determined claimant suffered a compensable work-related accident and awarded claimant benefits in accordance with the stipulation.

Respondent requested review and argues claimant did not suffer personal injury arising out of and in the course of his employment. In the alternative, the respondent argues that claimant's right upper extremity injury is not compensable because claimant was injured while performing an activity respondent had specifically instructed claimant not to perform. Lastly, respondent requests reimbursement from the Workers Compensation Fund if benefits are denied.

In contrast, claimant requests the Board to affirm the ALJ's Award. Claimant contends he was told by his immediate supervisor to assist a paint contractor in moving an entertainment center in an apartment that respondent had contracted with the painter to paint. While in the process of moving the entertainment center claimant injured his right upper extremity. Claimant argues that because he was instructed to assist in moving the furniture such activity was not a forbidden work activity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board concludes that the ALJ's Award should be affirmed. The Board finds that the ALJ's findings and conclusions contained in her Award are accurate and appropriate. The Board concludes there is no need to reiterate those findings and conclusions in this Order. Therefore, the Board adopts the ALJ's findings and conclusions as its own.

The Board finds it significant that Reba Wade's testimony, the tenant in the apartment being painted, primarily supports the claimant's version of events. The entertainment center had not been moved before Ms. Wade left her apartment and was moved when she returned. While Ms. Wade did not witness claimant and the painter move the entertainment center, nonetheless, her testimony disputed the painter's assertions that he had never moved furniture and further established that it would take two people to move the entertainment center.

The Board agrees with and adopts the ALJ's conclusion that claimant was directed to help the painter move the entertainment center and while performing that activity he suffered the injury to his right shoulder. Because he was directed by his supervisor to move the entertainment center it was not a forbidden activity.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Julie A.N. Sample dated February 28, 2003, is affirmed.

IT IS SO ORDERED.

Dated this 29th day of August 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Michelle D. Haskins, Attorney for Respondent and its Insurance Carrier
Paula S. Greathouse, Workers Compensation Director